Before the Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Satellite Delivery of Network Signals	)	
to Unserved households	)	CS Docket No. 98 - 201
for Purposes of the Satellite Home	)	RM No. 9335
Viewer Act	)	RM No. 9345
	)	
Part 73 Definition and Measurement	)	
Of Signals of Grade B Intensity	)	

COMMENTS OF THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS

Marilyn Mohrman-Gillis
Vice President, Policy &Legal Affairs

Lonna M. Thompson
Director, Legal Affairs

Association of America's Public
Television Stations
1350 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
202-887-1700

Law Clerk
Andrew Cotlar
American University School of Law

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COMMENTS OF THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS.

The Association of America's Public Television Stations ("APTS") hereby submits its comments regarding to the Commission's *Notice of Proposed Rulemaking* ("NPRM") in this proceeding, issued November 17, 1998. In response to petitions for rulemaking filed by the National Rural Telecommunications Cooperative ("NRTC") and EchoStar Communications Corporation ("EchoStar"), the Commission is proposing to revise the way it defines, measures, and predicts the strength of television signals in determining whether a consumer is "unserved" by local television stations and eligible to receive those stations via a direct broadcast satellite feed under the 1988 Satellite Home Viewer Act (SHVA).

APTS is a membership organization whose members are licensees of virtually all of the nation's 353 local public television stations. APTS serves as the direct national representative of these stations, presenting their views and

participating in proceedings before Congress and executive and administrative agencies, as well as other venues.

APTS is greatly concerned about the potential impact of the Commission's proposal on local public television stations. APTS generally supports the arguments made by the National Association of Broadcasters ("NAB") and others in opposition to the NRTC and EchoStar petitions for rulemaking in RM No. 9335 and RM. No. 9345. Redefinition of the existing Grade B standard for SHVA purposes is not within the authority of the Commission, may unwisely affect the delicate balance presently achieved through ongoing industry solutions, and may impact other key Commission rules that are based on the Grade B standard. Any redefinition must be done pursuant to legislative action.

I. INTRODUCTION AND SUMMARY

In the 1988 Satellite Home Viewer Act, 17 U.S. C. §119, Congress granted a limited exception to the exclusive programming copyrights enjoyed by television networks and their affiliates because it recognized that some households were unable to receive network station signals over the air and were unserved by cable. (NPRM ¶2) The exception created a narrow compulsory copyright license to satellite carriers who retransmitted national network signals to "unserved households." Congress defined an unserved household to be one which:

> "(A) cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network, and

> (B) has not, within 90 days ... subscribed to a cable system that provides the signal of a primary network station affiliated with that network."

17 U.S.C. §119 (d)(10).

In passing this narrowly tailored provision, Congress had in mind the twin goals of preserving the network-affiliate relationship and honoring the principles of localism in broadcasting. (NPRM ¶3) Congress recognized the importance of ensuring the delivery of free, over-the-air broadcasting to American families and making available to local citizens information of interest to the local community. (NPRM ¶3)[1] In constructing this narrow exception in copyright law, Congress was concerned that, without copyright protection, the economic viability of local stations may be jeopardized. (NPRM ¶3)

APTS is concerned that the modifications to the Grade B standard proposed by the FCC will unduly restrict public television stations' abilities to make local decisions regarding DBS service in their markets. Public television stations do not receive advertising dollars, but rather are dependent upon membership contributions from community residents and local businesses. This important source of revenue would be potentially undermined by constriction of stations' service areas. For these reasons, APTS urges the Commission to retain the status quo and not adopt any new rules modifying Grade B intensity, predictive methods, or measurement standards.[2]

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[1] *See also* H.R. Rep. 100-887(II), at 26-28 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5577; H.R. Rep. 100-887(I), at 19-20; and Radio Act of 1927, 47 U.S.C. §307(b)(1997).

[2] Public television stations and PBS do not have the same affiliate network relationship as the commercial stations. PBS is a membership organization of which the public television stations are members, and, as members, the stations pay PBS to aggregate and distribute PBS programming. While this structure

The satellite providers, however, insist that the Commission should expand their reach into local markets by modifying either the definition of Grade-B signal intensity or by changing prediction or measurement.[3] The NRTC petition seeks to have the Commission adopt a new definition of "unserved" that includes all households located outside the Grade B contour encompassing a geographic area in which 100% of the population received over-the-air coverage by network affiliates 100% of the time using readily available, affordable receiving equipment. (NPRM ¶9) EchoStar requests that the Commission adopt a prediction model in locating unserved households, which requires that the Grade B signal be received 99% of the time among 99% of households with 99% confidence. (NPRM ¶9) It is estimated that if the Commission were to change its definition of Grade B signal strength or its methodology of predicting such strength (the Grade B contour), as many as nine million households (10% of American television households) could change from being labeled "served" to being labeled "unserved." (*See* NPRM ¶14, citing letter of Larry Irving, director of the National Telecommunications Information Agency, to Chairman Kennard, September 4, 1998.)

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differs from the commercial network-affiliate relationship, the principles of preserving localism and the ability of the stations to provide free over-the-air programming to the public apply with equal force to PBS member stations.

[3] The Grade-B intensity standard has been used by the Commission for a variety of purposes and represents the field strength of a signal 30 feet above ground that is strong enough, in the absence of man-made noise or interference from other stations, to provide a television picture that the median observer would classify as "acceptable." In particular, the Grade B contour is defined as the set of points along which the best 50% of the locations should get an acceptable picture at least 90% of the time. (NPRM ¶4) Because the Grade B contour is a predictive measure, some households that are predicted to receive an adequate picture may in actuality fall short of this standard and households that are not predicted to receive an adequate picture may in fact receive one.

As the Commission recognizes in its NPRM, and as recent federal court decisions have documented, some satellite service providers (including PrimeTime 24, the subject of three separate copyright infringement actions) have been illegally and willfully selling direct network signals to subscribers who are quite capable of receiving a local Grade B signal. (NPRM ¶¶6-8) Two district courts have issued injunctions against PrimeTime 24, and the satellite providers have now taken their case before Congress, as well as the Commission. (NPRM ¶¶6-8) In this high-stakes administrative law gamble, the satellite providers hope that Commission action will not only reverse the adverse judgments against them, but also create a substantial windfall of new customers at the expense of local broadcasters. APTS contends that, not only does the Commission lack the authority to cede to these demands, but to do so would be poor public policy as well.[4]

II. ARGUMENT

The Commission solicits comments on four questions relative to its exercise of authority: (1) whether Congress "froze" the definition of a signal of Grade B intensity for purposes of SHVA when it adopted the Act in 1988 (NPRM ¶20); (2) whether it has the authority to revise its Grade B rules specifically for the purposes of SHVA (NPRM ¶22); (3) whether it has the authority to develop a model for predicting whether an individual household can receive a signal of

[4] The Commission wisely recognizes this may be the case. See NPRM ¶27 ("Changing the standard of an acceptable signal could have detrimental effects on the viability of local television stations and, potentially, on the goal of localism.")

Grade B intensity for purposes of SHVA (NPRM ¶23); and (4) its conclusion that its authority to define a signal of Grade B intensity reasonably includes the authority to adopt a method of measuring signal intensity at an individual household (NPRM ¶25).

A. The Commission's Authority to Proceed is Limited.

APTS contends that Congress intended to apply the established definition of Grade B in SHVA and that the Commission neither has the authority to revise its Grade B rules particularly for the purposes of SHVA, nor the authority to develop an alternative predictive model or an alternative measurement of signal intensity. APTS agrees with the Commission that, as a general matter, it possesses discretion to revise its rules (NPRM ¶ 22), but this discretion is inherently limited by Congress' delegation of its authority to the Commission as well as Congress' specific directives and policy choices. In fact, the Commission recognizes this when it concludes that it does not have the statutory authority to prevent most of PrimeTime 24's subscribers from losing their network service under the Miami and Raleigh injunctions, because many, if not most, of those subscribers do not live in "unserved" households under any acceptable interpretation of the term. (NPRM ¶15) What authority the Commission does have to modify or affect its definition of "Grade B contour" is therefore narrowly circumscribed.

The Commission tentatively concludes that Congress did not "freeze" the definition of Grade B intensity for SHVA purposes when, in defining "unserved

household," it referred to households who cannot receive through the use of a conventional outdoor rooftop receiving antenna, "an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission)" from a network affiliate. (*See* NPRM ¶20; 17 U.S. C. §119(d)(10)) However, APTS agrees with the NAB and others that by inserting the parenthetical phrase, "as defined by the Federal Communications Commission," Congress meant to incorporate the standard as already defined, and did not mean to create a flexible standard subject to FCC modification.

NAB argues, citing Hassett v. Welch, 303 U.S. 303, 314 (1938), that it is a "well settled cannon" that "[w]here one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted . . . [s]uch adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications by the statute so taken unless it does so by express intent." (NPRM ¶18) The FCC, following the suggestion of the petitioners in this proceeding, cite, however, an opposing principle in Lukhard v. Reed, 481 U.S. 368, 379 (1989), namely that "it is of course not true that whenever Congress enacts legislation using a word that has a given administrative interpretation it means to freeze that administrative interpretation in place." (NPRM ¶19, 21)

In the face of these indeterminate and dueling cannons of legislative interpretation, APTS believes that a simpler, plain language argument should prevail. Had Congress intended to create a flexible standard, it would have used different words than it did. For instance, it could have said, "as the Federal

Communications Commission may define," employing the future tense to imply a flexible, evolving definition. Or, it could have simply omitted the parenthetical phrase altogether, allowing for administrative interpretation in the face of legislative silence. See Chevron v. National Resources Defense Council, 467 U.S. 837 (1984). However, Congress did not walk down either of these paths. It wrote specifically in the past tense; thus, one must infer that it meant to use the definition that was in effect when the law was passed. The Commission's counter-argument requiring Congress at all times to cite to specific sections of the Code of Federal Regulations and to reference enactment dates (NPRM ¶20) is overly restrictive and unrealistic.

Moreover, in addition to plain language evidence that Congress meant to incorporate an already existing standard rather than a standard subject to evolution, legislative history indicates the same conclusion. As the Network Affiliated Stations Alliance has argued, a committee report accompanying SHVA referred to the Grade B intensity standard "as defined by the FCC , currently in 47 C.F.R. Section 73.683(a)" *(emphasis added)*.[5] This is precisely the kind of evidence the Commission seeks, but the Commission erroneously concludes that the legislative history is silent when in fact Congress could not have been clearer. (NPRM ¶20)

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[5] Comments of The Network Affiliated Stations Alliance, *In the Matter of the Petition of EchoStar Concerning the Definition of an Over-the-air Signal of Grade B Intensity for Purposes of the Satellite Home View Act,* RM 9345, p. 23, quoting H.R. Rep. No. 100-887 (II) at 26 (emphasis added).

B. The Commission Should Not Disturb The Results of Litigated Actions and Compromises.

Privately negotiated industry arrangements have already supplied criteria for predictive signal intensity and measurements of signal intensity; consequently, the Commission should be wary of disturbing such arrangements. In the wake of the district court litigation which precipitated the underlying petitions, broadcasters and satellite service providers have negotiated a series of agreements that the Commission cites with approval. APTS supports these self-governing measures, insofar as they preserve localism in the market. Further, good public policy dictates that the Commission should not disturb privately negotiated industry arrangements when such arrangements are an adequate substitute for agency action and where the public interest is not adversely affected.

As the Commission has recognized, such negotiated industry arrangements do exist and have been used successfully when applied. (NPRM, ¶24) For instance, some broadcasters have entered into agreements with Primestar and Netlink (both satellite television providers) to resolve SHVA disputes by assigning zip codes to each station and classifying each zip code as "red light" if more than 50% of the zip code's population is served (based on Longley-Rice propagation data) and as "green light" if 50% or less of the zip code's population is served. (NPRM, ¶24, n.53; 42) Satellite television providers are thus barred from signing up new subscribers in the "red light" zip codes unless a station grants a "waiver"[6] or the

[6] Strictly speaking, local television stations cannot "waive" a third party's copyright broadcast rights, but in the arrangements described above, the local television station does consent to having satellite providers operate within the local television stations' territory. Because the NPRM uses the term "waiver" throughout,

satellite carrier conducts a signal intensity test that shows the household does not receive a Grade B intensity signal. (NPRM, ¶24, n.53; 42) In the spirit of increasing public access to public television, APTS member stations have been freely granting "waivers" to DBS providers in situations where it is clear to the member station that the subscriber location in question is not within the Grade B contour of the station or otherwise unable to receive the station's signal.

Under the privately negotiated industry agreements, the parties have agreed, in accordance with 17 U.S.C. §119(a)(9), that if a broadcaster requires a satellite provider to engage in signal measurements, which subsequently show the household in question is unserved, the broadcaster must pay for the cost of the measurements -- a "loser pays" approach. Conversely, if the household in fact is served, the satellite provider must pay. (NPRM, ¶24, n.53; 41) As the Commission stated, "The loser pays mechanism, if used even in the absence of a civil action, would substantially alleviate the cost and burden of conducting actual signal measurements by giving both parties an economic incentive to avoid actual measurements in most circumstances." (NPRM ¶41)[7]

Presumptive "red-zones," "loser-pays" provisions, case by case "waivers" and other forms of privately negotiated industry agreements, all represent alternatives to Commission action and should as a matter of policy be respected. Consequentially, the Commission need not intervene with regulatory action in

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APTS is using the terminology with the understanding that such a practice constitutes consent rather than an actual waiver of copyright rights.

[7] In other circumstances, private corporations, such as Decisionmark Corporation, have developed useful models for resolving Grade B contour disputes between broadcasters and satellite providers, models that have been cited with approval by the Commission. (NPRM ¶ 34, n71; 42)

this arena and should refrain from redefining the Grade B contour, from changing any predictive methodology, and from modifying standards for measuring signal strength in ways that may upset this delicate balance of interests. In particular, the Commission must refrain from effectively granting the DBS operators such special privileges as to risk endangering the results of the litigation and industry compromises, as well as the Congressional interest in preserving localism in broadcasting.

C. Proposed Revisions to the Grade B Standard Will Negatively Impact Other FCC Rules.

APTS urges to the Commission not to adopt its proposed revisions to the Grade B standard because of the imminent impact of this action on other Commission rules that incorporate the Grade B standard. In its NPRM, the Commission states that its focus is changing the Grade B standard specifically for SHVA purposes. (NPRM ¶26) However, the Commission acknowledges the fact that other non-SHVA rules or policies may be implicated by the proposed changes. (Id). As recognized by the Commission, the "DTV service replication models are also based upon duplicating the Grade B service area of existing analog broadcast stations. Certain interference criteria also incorporate the Grade B service area of television broadcast stations." (Id.)

In fact, in its petition, EchoStar requests that the redefinition of signal intensity be applied to the digital television context. Because of its members' commitment to the transition to digital television, APTS is concerned that any modification of the Grade B standard may negatively affect the use of the

Longley-Rice model for predictions of Grade B signal strength within the digital context. (NPRM ¶22) One of the Commission's purposes in the use of Longley-Rice for the digital rules was to ensure that broadcasters would have the ability to reach the audiences they now serve with their new digital channels.[8]

The Commission itself recognizes the widespread use of the Grade B standard in its rules and states that it "has used the Grade B standard for a variety of purposes, many of which were not envisioned at the time it was adopted." (NPRM ¶4) As the NPRM notes, a qualified public television station is defined for must carry purposes as the station whose Grade B service contour encompasses the cable system's principal headend, as defined in section 73.683(a) of the rules.[9] The Grade B standard is also used in connection with NTIA broadcast applications, in which the source of public telecommunications signal is distant when beyond the grade B contour of origination facility.[10] Additionally, the Grade B standard is used in connection with distance separation requirements for public mobile operations to reduce interference with television stations at the grade B contour.[11]

If the Commission promulgates rules modifying the Grade B definition, its predictive methodology, or measurement practices, then logically the Commission's rationale for doing so may be applied beyond the SHVA context to

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8 In Re Advanced Television Stations and Their Impact Upon the Existing Television Broadcast Service, FCC 97-115, ¶29, 12 FCC Rcd. 14588, 14605 (1997). (NPRM ¶ 4, n14)

9 47 U.S.C. § 535(1)(2)(B). *See also*, 47 U.S.C. § 522(11) (defining Grade B contour in connection with cable regulation as computed in accordance with regulations promulgated by the Commission).

10 15 C.F.R. § 2301.4(b)(3)(ii).

11 47 C.F.R. §§ 22.657(d)-(g)

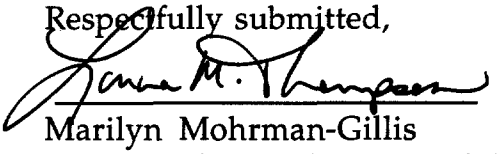
other rules utilizing the Grade B standard. APTS is concerned that the proposed modifications will negatively impact these other rules and negatively affect settled practice in other areas of broadcast service.

CONCLUSION

It is important for APTS member stations that membership contributions and the principles of localism in public broadcasting be preserved. APTS is concerned that the modifications to the Grade B standard proposed by the FCC will undermine the principles of localism, will adversely impact industry compromises, and will unravel other key FCC rules based on the Grade B

standard. For these reasons, APTS urges the Commission to retain the status quo and not adopt any new rules modifying Grade B intensity, predictive methods, or measurement standards.

Respectfully submitted,



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